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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1013

LOUIS J. SCHWARTZ,

Petitioner,

v.

RUBENIA TANNER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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CINCINNATI, OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ————

LOUIS J. SCHWARTZ,

Petitioner,

v.

RUBENIA TANNER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgement and orders of the Supreme Court of Ohio entered in case No. 38910 of that court, entitled *Rubenia Tanner, Complainant Appellee* v. *Louis J. Schwartz, Defendant-Appellant.* On Oct. 14, 1964 a timely Motion for Rehearing was filed which was denied on November 23, 1964.

OPINIONS BELOW

The judgement and order of the Common Pleas Court of Hamilton County, Ohio of March 19, 1964 in Case No. J.D.10204 of that court is set out in Appendix A to this Petition at page 11 same is unreported.

The judgement dismissing Petitioners Appeal to the Court of Appeals for the First Judicial District, Hamilton

County, Ohio in Case No. 9480 of said Court is set out in Appendix B to this Petition at page . . same is unreported.

The judgement and orders of the Supreme Court of Ohio in Case No. 38910 of said Court is set out in Appendices C and D to this Petition. Said Court's order dismissing Petitioner's Appeal is reported at 177 Ohio St. 60 and in Ohio Bar No. XXXVII of Nov. 23, 1964.

JURISDICTION

The judgement and orders of the Supreme Court of Ohio were entered on Oct. 14, 1964, a timely Motion for Rehearing was filed and denied November 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since rights specially claimed under the Constitution of the United States and State of Ohio are drawn into question.

QUESTIONS PRESENTED

Where a Defendant having raised a personal objection as well as an objection being made by his attorney, in a bastardy action, as on Cross-Examination on reliance of his constitutional rights as provided for by the Fifth Amendment to the Constitution of the United States and Section Ten, Article 1, of the Ohio Constitution, may a Defendant be forced to testify so as to incriminate himself.

Where Petitioner was not afforded a trial before an impartial jury as provided for by the Sixth Amendment to the Constitution of the United States. It should be noted that this applies to both criminal and civil causes. Does not an arbitrary refusal to remand such cause for appropriate disposition become a violation of the constitutional rights of the offended party?

Where the Petitioner was not afforded due process of law or equal protection of the law as proved by the Fourteenth Amendment to the Constitution of the United States, does not a perfunctory dismissal raise a most substantial constitutional question?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States, in part.

Sixth Amendment to the Constitution of the United States, in part.

Fourteenth Amendment to the Constitution of the United States. Section 1.

Section 2905.08. Ohio Reviewal Code. Section Ten. Article 1 Ohio Constitution. Section 3111.01 Ohio Revised Code. Section 3111.08 Ohio Revised Code.

STATEMENT OF THE CASE

Respondent secured the issuance of a warrant in the Juvenile Division of the Court of Common Pleas of Hamilton County, Ohio, alleging the Petitioner to be the father of her child born on or about May 20, 1961. To this charge the Defendant pleaded not guilty.

The case was then tried by a jury which found in favor of the Respondent and final judgement was entered thereon.

Thereupon, Defendant filed a motion for a new trial, and the trial court, after considering said motion on oral arguments of counsel, and affidavits filed, overruled the same.

Thereupon, Defendant-Appellant filed a Notice of Appeal in the Court of Appeals for Hamilton County, Ohio, and said Court, after oral argument and the submission of briefs on May 4, 1964, handed down its opinion affirming the judgement of the trial court. On May 11, 1964, judgement of affirmance was entered in the Court of Appeals for Hamilton County, Ohio. (See Appendix B.)

Thereafter, on May 29, 1964, Petitioner filed his Notice of Appeal as of right and thereafter filed a motion to certify the record to the Supreme Court of Ohio (see Ap-

pendix F) and said Court after argument and submission of briefs dismissed the appeal of right and denied the Motion to Certify the Record, whereupon Petitioner filed a motion in the said Supreme Court of Ohio for a rehearing which was denied and on November 23, 1964 a mandate was issued to the Common Pleas Court of Hamilton County, Ohio ordering the following judgement in part in this cause into execution: "Dismissed for the reason that no substantial constitutional question exists herein (see Appendix C).

THE SUBSTANTIAL CONSTITUTIONAL QUESTIONS INVOLVED IN THE ISSUE

The trial court by refusing to give a directed verdict for the Petitioner herein and likewise overruling the motion for a new trial deprived the Petitioner of his constitutional rights as guaranteed by the Fifth Amendment to the Constitution of the United States and Section Ten Article One of the Ohio Constitution due to the fact he had objected previously to testifying as on Cross-Examination. Petitioners constitutional rights were further ignored as it was evident that one of the jurors was prejudiced and had made statements to the effect that the Petitioner was guilty, and made other inflammatory statements (see Appendices H and I). This is violation of the Petitioners rights as granted by the Sixth Amendment to the Constitution of the United States. He was further denied equal protection and due process of the law as guaranteed by the Fourteenth Amendment of the United States

These same rights were completely ignored by the Court of Appeals, First Appellate District of Ohio when the constitutional question was squarely placed before it both by oral argument and by brief, pointing out at page 21 in said brief that in *Schneider* v. *State, ex rel.* Shorf 33 O.App. 125, 168 N.E. 568, states: In a bastardy pro-

ceeding it was reversible error to permit the Defendant to be called by counsel for complainant and over his objection compelled to testify against himself. The Court in its opinion discusses the civil and criminal aspects of bastardy cases and points out that Section 10, Article 1 of the Ohio Constitution prohibits testimony in such matter.

The Supreme Court of Ohio without hearing the merits of Petitioner's case overruled the Motion to Certify the Record and dismissed the appeal as of right, saying in part "On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein (see Appendix C).

REASONS FOR GRANTING THE WRIT

In their judgement of affirmance of the verdict rendered by the Common Pleas Court of Hamilton County, Ohio, the Court of Appeals for Hamilton County, Ohio, and the refusal of the Supreme Court of Ohio to certify the record violated the Petitioner's constitutional rights in at least three instances.

The law of Ohio is not clear on whether or not a bastardy action is a civil or criminal action, but many cases including *Schneider* v. *State, ex rel.*, Shorf 33 Ohio App. 125, have held it is a violation of a defendant's constitutional rights to be compelled to testify against himself, other cases have held that a defendant may waive that privilege and that such privilege must be personally claimed, which was done in this instant case. This is shown by the record at pages 97 and 98 after the Defendant Louis J. Schwartz was called as witness for the complainant. The record shows Mr. Haney, attorney for Petitioner, said "Let the record show I am objecting to the calling of the Defendant Louis Schwartz on Cross-Examination." The Witness (Schwartz): "Mr. Tobias, it is my understanding that I have to put a personal objection in the record as well as

the one made by my attorney, *which I am making.* (Emphasis added.) The Court: "He's going to testify. *I tell you he is going to testify* (emphasis added), but he may object to testifying. He's not refusing to testify." Mr. Fobias (counsel for complainant-respondent): "Yes, but he is objecting." The Court: "He is registering an objection. There is reason Quasi Criminal case and he has got it in the record. He has noted his objection and if this Court is wrong, there are three men on the fifth floor who will tell me I'm wrong."

We contend there is no reported case of an appellate or Supreme Court decision in Ohio whereby, when a defendant makes a personal objection in a bastardy action that he be required to testify. Other cases state that he may waive this privilege and others state that he, the defendant, must make a personal objection.

In the instant case the Defendant was asked by counsel for the Respondent herein "If he had ever been intimate with the Complainant," the defendant being under oath and a jurist himself testified that he had.

Whether or not a bastardy proceeding in Ohio is a criminal or civil action, although it seems to be more criminal than civil, it is clear that a witness in a civil or criminal case cannot be required to give testimony which will tend to incriminate him and this immunity is referable to the constitutional guaranty against self-incrimination. If it is contended that the Petitioner herein being forced to answer the question as to whether or he had been intimate with the Respondent would have been subject to arrest by the laws of the State of Ohio, under Section 2905.08 Ohio Revised Code which reads "No person shall cohabit in a state of adultery or fornication. Whoever violates this section shall be fined not more than two hundred dollars and imprisoned not more than three months.

This fact alone would have made the forced testimony of the Petitioner self-incriminating. The fact that Section 3111.01 (see Appendix K), permits the accused to be arrested and the fact that Section 3111.08 (see Appendix L) requires that the accused give bond in the sum of not less than three hundred dollars nor more than one thousand dollars and if he is unable or unwilling to do so to be committed to the jail of the county, there to be held to answer the complaint. Is this not a criminal action? Where in any civil case in any jurisdiction is a defendant subject to arrest and be confined to jail if he is unable to produce the proper bond?

As was stated by Judge Charles McNamee in *United States* v. *DeCarlo*, U.S. District Court N.D. Ohio E.D. 20299, far better than we could state we quote: "The appliable rule in this case hereby stated is that in Ohio as to self-incrimination, appears to rest on the determination of the witness himself.

Indeed the historic trial of Aaron Burr, Fed. Case, pp. 38, 40, No. 14, 692 in which Chief Justice Marshall said:

> "It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he says on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

The Supreme Court of the United States in *Slagle* v. *State*, 366 U.S. 259 decided May 15, 1961 stated: "A person summoned to testify before any adjudicatory or investigatory body, including a legislative investigatory commit-

tee may object to any question put to him upon any available ground however tenuous."

Can it not be said in the instant case the Petitioner's civil rights guaranteed by the Constitution of both the State of Ohio and the United States were not violated.

It is fundamental to our judicial process that when one comes to trial before a jury that he receives a fair trial by an impartial jury. This is guaranteed by the Sixth Amendment to the Constitution of the United States in a criminal case. It is likewise true of a civil case.

It is quite evident that the Petitioner did not have a fair trial before an impartial jury. The statement made by one of the jurors made on May 18, 1963 (see Appendices H and I), indicated that she was not impartial. It must be understood that this statement was made before the Petitioner had an opportunity to present his case and after he was forced to testify over his objections, and was forced to testify that he had been intimate with the Respondent. Is this what our Constitution guarantees us?

The record indicates that the trial of this case was replete with error (see Motion for New Trial, Appendix J and Assignment of Error to Court of Appeals, Appendix G). Had Petitioner been anyone other than he was, any trial judge would have directed a verdict in his favor, and any Court of Appeals, disregarding the constitutional questions involved, would have remanded the case for a directed verdict or in any event ordered a new trial. Should the Petitioner, because he is a lawyer and judge have any less due process of law than any other citizen of Ohio or the United States? It is believed that the decisions in this case to date have been the most contrary to constitutional and substansive law of any case in the State of Ohio.

It is unfortunate and regrettable that the Petitioner has had to petition this court in a Writ of Certiorari, and that another judge by the same name, in fact the Judge of the

Juvenile Court in which the original warrant was filed has had to live with the attendant publicity of this case. The Petitioner feels badly about this, however, the alternative would have been to have submitted to blackmail.

The testimony of the Respondent's doctor, Doctor Arthur Backman (Transcript of record, page 120), testified that the Respondent stated her last menstrual period was July 15, 1960, which was some three weeks before Petitioner even knew Respondent.

CONCLUSION

Petitioner is a lawyer and judge and has nothing but contempt for untruth. A reading of the record including the record of the preliminary hearing, which should have been introduced into evidence but was not allowed by the trial judge indicates the Respondent does not have such high regard for the truth.

The Petitioner believes in substantial justice and that is a must in his court. Associates of counsel for Respondent would, we believe, have to agree with this.

Petitioner has been denied the constitutional rights guaranteed to him by the Constitution of the United States and the State of Ohio. Where else may he look for justice if not to the Supreme Court of the United States of America?

He is denied for all time those inalienable rights if that Court sees not fit to heed his request.

Counsel in making this plea to this sovereign Court and knowing of the finality of this Court's reply, knows of the temperament and fine qualities of Petitioner and his quest for right, and his distaste for untruth in any form. With great belief in the righteousness of his cause, Counsel hopefully brings this Petition to a close by urging that Petitioner's constitutional and civil rights be recognized and

in the furtherance of justice, that this honorable and sovereign Court should hear the substantial merits Petitioner has in this cause.

Respectfully submitted,

RICHARD D. HANEY,
900 Fountain Square Bldg.,
Cincinnati 2, Ohio,
Counsel for Petitioner.

March 15, 1965.

APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
(Entered March 19, 1964.)

Juve. Ct. No. 19204

RUBENIA R. TANNER,

Plaintiff-Complainant,

v.

LOUIS J. SCHWARTZ,

Defendant.

ENTRY AND ORDER

This action having been tried before the jury and a verdict having been rendered that the Defendant is the father of Louis Eric Tanner, illegitimate child of the Plaintiff, said Defendant Louis J. Schwartz is hereby ordered to pay to the Plaintiff, Rubenia Tanner, the sum of $25.00 per week for the support and maintenance of said child until he attains the age of eighteen years old, beginning from the date of this Order, which sum the Court finds to be necessary therefor.

The Defendant is also ordered to pay the sum of Three Thousand, Eighteen ($3,018.00) Dollars, which represents the sum of $25.00 per week for support and maintenance of said child from the date of birth until the date of this Order, credit having been given for sums already paid by Defendant for said support to all of which the Defendant excepts.

/s/ FERD BADER

/s/ RICHARD D. HANEY
/s/ PAUL H. TOBIAS

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY
OHIO

No. 9480

RUBENIA TANNER,

Plaintiff-Appellee,

v.

LOUIS SCHWARTZ,

Defendant-Appellant.

JUDGMENT OF AFFIRMANCE

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the Appellee recover from the Appellant, his costs herein expended, taxed at $.....

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment. To all of which Appellant, by his counsel, excepts.

/s/ PAUL H. TOBIAS,
PAUL H. TOBIAS, ESQ.,
Attorney for Plaintiff-Appellee,

RICHARD HANEY, ESQ.,
Attorney for Defendant-Appellant.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

1964 TERM

No. 38910

THE STATE OF OHIO }
City of Columbus. }

To wit: Wednesday, October 14, 1964

RUBENIA TANNER,

Appellee,

v.

LOUIS J. SCHWARTZ,

Appellant.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

Mandate

To the Honorable Court of Common Pleas within and for the County of Hamilton, Ohio, Greetings:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution.

Dismissed for the reason that no substantial constitutional question exists herein.

APPENDIX D

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Richard D. Haney.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 14th day of October, 1964.

_____

Clerk

_____

Deputy

APPENDIX E

REHEARING

It is ordered by the Court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ....., Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of Nov. 1963.

_____

Clerk

By_____

Deputy

APPENDIX F

MOTION TO CERTIFY RECORD

Now comes Louis J. Schwartz, Defendant-Appellant, and moves the Court for an order directing the Court of Appeals to certify the record in this cause, for the reasons set forth in the Brief accompanying this Motion.

/s/ RICHARD D. HANEY,
RICHARD D. HANEY,
Attorney for Defendant-Appellant,
900 Fountain Square Bldg.,
Cincinnati 2, Ohio.

Service of the above Motion to Certify Record is hereby acknowledged this ..... day of ....., 1964.

PAUL H. TOBIAS,
Attorney for Plaintiff-Appellee,
911 First National Bank Bldg.,
Cincinnati 2, Ohio.

APPENDIX G

II. ASSIGNMENTS OF ERROR ON BEHALF OF DEFENDANT-APPELLANT

A. As a matter of law, the Court erred in overruling Defendant's motion for new trial.

B. The Court erred in sustaining an objection to testimony by a witness for the Defendant, when in fact no objection was made by counsel for the Complainant.

C. Misconduct by counsel for the Complainant, in that he made material misstatements of facts in representations to the jury in his closing argument.

D. Misconduct of the jury in that the case was publicly discussed by a juror and statements made indicating that the juror had arrived at a decision before the Defendant had put on any evidence.

E. The verdict is not sustained by the weight of the evidence and is contrary to law in that:

1. There was no proof that the Complainant was a single person at the time of conception of her child nor at the birth thereof.

2. There was no documentary evidence introduced that Complainant had divorced her husband.

F. Error of law properly excepted to by Defendant at the time of trial in that:

1. The trial Court erred in refusing to admit for the consideration of the jury the original transcript of the preliminary hearing in this cause when offered by the Defendant.

2. The trial Court erred in refusing to admit an anonymous letter showing that the Defendant was being subjected to blackmail.

3. The trial Court erred in permitting evidence as to payments made by Defendant to Complainant, which payments were in the nature of an offer in compromise.

4. The trial Court erred in requiring the Defendant to testify as on cross examination when an objection was made by the Defendant.

5. The trial Court erred in permitting medical evidence having no bearing on the case as to the average time of conception.

APPENDIX H

AFFIDAVIT

STATE OF OHIO }
COUNTY OF CLERMONT } ss.

I, James Holcomb, being first duly cautioned and sworn depose and say, that I am the owner of the Gateway Inn, located on State Route No. 50, in Clermont County, Ohio, and that on May 18, 1963, in the afternoon Mrs. Mary Patterson in the company of her husband, stated, that We are going to hang a dam Clermont County, judge. She did not mention by name the judge but she stated that he lived in Amelia. Mrs. Patterson stated further that he is guilty and we are going to find him guilty. Mrs. Patterson further stated we are trying him on a paternity case or bastardy case.

Affiant further states that there were about fifteen to twenty people in the cafe at the time Mrs. Patterson made these statements. Affiant further states that Mrs. Patterson talked about this subject between five and ten minutes. Mrs. Patterson further stated that she was on a jury in Cincinnati or Hamilton County, hearing this case.

Affiant further states that these statements made by Mrs. Patterson were not made directly to him but that he overheard them. Further affiant saith not.

/s/ JAMES A. HOLCOMB
JAMES A. HOLCOMB

Sworn to before me and subscribed in my presence this 19th day of June 1963.

/s/ STEPHEN A. DURKEE,
STEPHEN A. DURKEE,
Comm. Exp. 9/11/62
Notary Public,
State of Ohio.

APPENDIX I

AFFIDAVIT

STATE OF OHIO }
COUNTY OF CLERMONT } ss.

I, Leroy Hartmetz, being first duly cautioned and sworn depose and say, that I, was in the Gateway Inn, which is located on State Route 50, in Clermont County, and the State of Ohio, on Saturday, May 18, 1963 in the afternoon, and I heard some lady appearing to be an elderly lady stated before several people that she was on a jury in Cincinnati that was hearing a case against a Clermont County Judge, and that this juror said they were going to throw the book at him. Affiant further says that he has heard that this woman was a realtor and that her husband works at the Post office.

/s/ LEROY HARTMETZ
LEROY HARTMETZ

Sworn to before me and subscribed in my presence this 19th day of June, 1963.

/s/ LOUIS J. SCHWARTZ,
LOUIS J. SCHWARTZ,
Notary Public,
State of Ohio,
Life Commission.

APPENDIX J

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. 10204

RUBENIA TANNER,

Complainant-Plaintiff,

v.

LOUIS J. SCHWARTZ,

Defendant.

MOTION FOR NEW TRIAL

Now comes the defendant by and through his Attorney and respectfully moves the Court for a new trial in this Cause for the following reasons.

1. Irregularity in the proceedings in that the court sustained an objection to testimony by a witness for the defendant, when in fact no such objection was made by counsel for the complainant.

2. That there was misconduct by Counsel for the complainant, in that he made material mis-statement of fact and representations to the Jury in his closing argument.

3. That there was misconduct of the jury in that the case was publicly discussed by a juror and statements made indicating that the juror had arrived at a decision

before the defendant had ever had a chance to put on his evidence.

4. That the verdict is not sustained by the weight of the evidence and is contrary to law in that:

A. There was no proof that the complainant was a single person at the time of conception of her child.

B. That there was no proof that the complainant had ever divorced her former husband.

5. That there was error of law properly excepted to by defendant at the time of trial in that:

A. The court erred in refusing to admit for the consideration of the jury, the original transcript of the preliminary hearing in this cause when offered by the defendant.

B. The court erred in refusing to admit an anonymous letter showing that the defendant was being subjected to blackmail.

C. The court erred in permitting evidence as to payments made by defendant to the complainant, which was in the form of a compromise.

D. The court erred in requiring the defendant to testify as on cross-examination when a personal objection was made by the defendant.

E. The court erred in permitting medical evidence that had no bearing on this case as to the average time of conception.

/s/ RICHARD D. HANEY,
RICHARD D. HANEY,
Attorney for Defendant.

APPENDIX K

3111.01 (8006-1). COMPLAINT. (Ohio Revised Code)

When an unmarried woman, who has been delivered of, or is pregnant with, a bastard child, makes a complaint in writing, under oath, before a justice of the peace or in juvenile court, charging a person with being the father of such child, the judge or justice shall issue his warrant, directed to any sheriff, police officer, or constable commanding him to pursue and arrest such accused person in any county and to bring him forthwith before such judge or justice to answer such complaint.

APPENDIX L

3111.08 (8006-8). JURISDICTION; BOND. (Ohio Revised Code)

If no compromise is effected as provided in section 3111.07 of the Revised Code, and the complaint has been filed in the juvenile court, the juvenile judge shall fix the time of the trial, and in such cases the court shall have jurisdiction to hear fully and determine such matter. The judge shall require the accused to furnish bail for his appearance in an amount not less than three hundred nor more than one thousand dollars, and with such security as the judge approves. If the complaint has been filed before a justice of the peace, the justice shall bind the accused to appear before the juvenile court or at the next term of the court of common pleas in a recognizance to the state, with sufficient surety, in not less than three hundred nor more than one thousand dollars, to answer the accusation, and abide the order of the court. On neglect or refusal to find such security, the justice or judge shall cause the accused to be

committed to the jail of the county, there to be held to answer the complaint.

In juvenile courts separately and independently created the judge may, unless trial by jury is waived, bind the accused to appear before the next term of the court of common pleas in the same manner as provided when the case has been filed with a justice of the peace.

APPENDIX M

FIFTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES (in part)

. . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. Nor shall private property be taken for public use, without just compensation.

APPENDIX N

SIXTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

In all criminal proceedings should enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor and to have the assistance of counsel for his defense.

APPENDIX O

FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

SECTION 1. All persons born as naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX P

SECTION 10, ARTICLE 1, OHIO CONSTITUTION

(in part)

No person shall be compelled, in any criminal case, to be a witness against himself.

FILE COPY

Office-Supreme Court, U.S.
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APR 21 1965
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. 1013

LOUIS J. SCHWARTZ,
Petitioner,

vs.

RUBENIA TANNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Respondent

Of Counsel:
PAUL H. TOBIAS
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

TO the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Respondent, Rubenia Tanner, prays that the petition for a Writ of Certiorari, filed in the within cause, be denied.

INTRODUCTION

This bastardy case was tried before a jury of the Common Pleas Court of Hamilton County, Ohio in May of 1963.

Respondent testified she and petitioner went on dates in the late summer and early fall of 1960. (R 6-8, 101). She testified they had sexual intercourse in late August 1960, on September 5, 1960, September 10, 1960 and September 11, 1960 (R. 12). Petitioner admitted having sexual intercourse with Respondent on three separate occasions in September of 1960 (R 101). He did not deny having intercourse with her on September 5. He admitted spending the night of September 10 with Respondent in a room at the Hotel Sinton in Cincinnati and did not deny sharing a double bed with her that night. (R 150-151).

The Tanner baby was born May 20, 1961 approximately 258 days after September 5 and 253 days after September 10, 1960. The expert medical witnesses agreed that a pregnancy of between 253-258 days is normal. (R 186, 42, 55). Medical testimony based on external examination during pregnancy confirmed that the baby was conceived sometime in early September 1960 (R 32, 42, 49, 121-122).

Petitioner admitted making payments of approximately $1,000 to Respondent, her physician and the hospital with respect to the pregnancy and her support. (R 24, 26, 26, 27, 28, 37). Respondent and her sister testified she had no dates with other men during the period of possible conception (R 16, 105). Petitioner offered no evidence of any involvement of Respondent with any other man during this period.

At trial Respondent's counsel called Petitioner as a witness. Petitioner did object to his being called as a witness. The Court overruled his objection. Petitioner proceeded to answer the questions posed by Respondent's counsel without any further invocation of the privilege against self-incrimination with respect to some other proceeding. Petitioner voluntarily testified in his own defense covering the same ground that had been covered in his examination by Respondent's counsel. The idea that answering the

question "Were you intimate with the Complainant?" might incriminate Petitioner with respect to a charge of fornication was not raised until two years after the trial. In his motion for new trial, assignments of error, brief before the Court of Appeals, brief before the Supreme Court of Ohio, and oral arguments, there was no mention of any such claim. (See for example, Appendix G and Appendix J of Petitioner's brief before this Court which only protest his being forced "to testify as on cross-examination").

After the trial Petitioner introduced Affidavits (Petitioner's Appendix H and Appendix I) which alleged that one of the jurors made statements in a cafe to the effect that she believed that Petitioner was the father of the child. At the hearing on Petitioner's motion for a new trial, Respondent presented two affidavits which flatly denied the charges and refuted the allegations of bias. These affidavits are also part of the record submitted to this Court.

The trial court as well as the Court of Appeals and Supreme Court of Ohio reviewed *both* sets of affidavits and determined there was no error in the proceedings.

PETITIONER'S CONTENTIONS

I. Petitioner's contention that a bastardy proceeding is a criminal case, and that Respondent's counsel had no right to compel petitioner to testify as a witness, has no merit.

The Supreme Court of Ohio has held that purpose of a bastardy proceeding is to enforce the duty of making provision for the maintenance of illegitimate offspring rather than to punish for misconduct and that a bastardy proceeding, under the Ohio statute, "in purpose and effect is essentially civil" and is "essentially a civil action" rather

than a criminal proceeding. *State ex rel Gill* v. *Volz*, 156 OS 60.

This classification by the Ohio Courts is in accord with the general rule throughout the nation. See 10 *CJS* Section 32, p.143: "Bastardy proceedings are generally considered under the various statutes to be civil in nature" and 10 *Am. Jur. 2*, Section 75, p.90 where it is stated that bastardy proceedings are "uniformly held to be civil proceeding." The footnotes at 10 *CJS* 143 and 10 *Am. Jur. 2*, 90, list cases in 23 jurisdictions and 18 jurisdictions respectively in support of the rule. For recent examples see *State* v. *Lender*, 124 NW 2d 355 (Minn.); *Dunn* v. *Grisham*, 157 SO 2d 766 (Miss..); *People* v. *O'Malley*, 192 NE 2d 589 (Ill.); *Stroman* v. *Gilbert*, 197 A 2d 99 (Conn.); *Commonwealth* v. *Dunnick*, 202 A 2d 542 (Pa.).

As a result the Courts have uniformly held that the Defendant may be called as an adverse witness and compelled to testify in a bastardy proceeding. For examples, see *Burt* v. *State*, 79 Ind. 359; *Territory* v. *Lanier*, 40 Hawaii 65; *State* v. *Jeffrey*, 188 Minn. 476; *State* v. *McKay*, 54 ND 801.

The most recent Ohio cases, *Taylor* v. *Mosley*, 87 OLA 335 (1961) and *State ex rel Johnson* v. *Mooney*, 87 OLA 105 (1961) follow the rule. In the *Taylor* case the Court held:

> ". . . an accused in a bastardy case may be called by counsel for complainant and over defendant's objection be compelled to testify under cross-examination."

In the *Johnson* case the Court held:

> "A bastardy proceeding is a civil action . . . it is thus governed by the rules of civil procedure and the right to call the putative father for cross examination is under favor."

The Supreme Court of the United States established the test to determine whether or not a proceeding is criminal or civil in *Huntington* v. *Atrill*,, 146 US 657 when it held that it depends on whether its purpose is "remedial" or "penal" and "it depends upon the question whether its purpose is to punish an offense against the public justice of the state or to afford a private remedy to a person injured by the wrongful act . . ."

This test has been followed by the lower federal courts when the question arose as to whether the 5th Amendment privilege was available in treble damage proceedings under the Emergency Price Control Act, *Bowles* v. *Seitz*, 62 FS 773; *Amato* v. *Porter*, 157 F2 719. In the *Bowles* case the Court held the 5th Amendment applies "only to criminal cases in the ordinary sense of that term" and that damages under the Act were "designated as reparation to sufferers from wrongs and not penalties recoverable in vindication of the public justice of the State." Other federal cases where the 5th Amendment privilege did not apply because the purpose of the proceeding was preventative and remedial rather than punitive and criminal are *Kent* v. *U. S.*, 157 F2 1, (Libel proceeding to forfeit distilled spirits and a truck used in violation of revenue laws); *U. S.* v. *One 1948 Cadillac Convertible Coupe*, 115 FS 723 (Proceeding for forfeiture of a vehicle used in unlawful narcotics transportation); *Zakonaite* v. *Wolf*, 33 S. Ct. 31; *Chen Chan Chu* v. *Shaughnessy*, 149 US 698 (deportation proceedings), and *Camden County Beverage Co.* v. *Blair*, 46 F2 648 (Proceeding for revocation of a permit).

Under the Ohio Bastardy Act (Chapter 3111, Ohio Revised Code) upon a finding of paternity the Court orders the reputed father to pay to complainant for the "support and maintenance of the child." He pays no fine to the State. There is no imprisonment unless he refuses to comply with the support order and then he shall be confined

only "until he complies with the order of the Court." Clearly the Ohio Bastardy Act has a remedial rather than a punitive purpose and therefore is a civil case in which the defendant may be compelled to testify. Petition has advanced neither reason nor authority why this Court should reverse the general rule established in the *Huntington* case and followed in Ohio and throughout this nation.

II. Petitioner's claim that he was compelled to answer a question that would incriminate him with respect to some other proceeding, has no merit.

Admittedly, a witness in a civil proceeding may invoke the 5th Amendment privilege. However, in the case at bar Petitioner did not raise the privilege in response to any of the specific questions. The Court had no opportunity to rule on the questions. As stated in the famous *Burr* case "when a question is propounded, it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. *U. S.* v. *Burr,* 25 Fed. Cas. No. 14,692. This rule is restated in *Rogers* v. *U. S.,* 340 US 367:

> "As to each question to which a claim of privilege is directed the Court must determine whether the answer to that particular question would subject the witness to a real danger of further crimination."

In a civil proceeding, the proper time to raise the objection is at the time the question is asked and not at the beginning of the testimony or in a brief two years later. See 98 *CJS* 296. In this case there was no compulsion because there was no objection and no claim of self-incrimination as to the specific question. As was stated in the *Burr* case "the privilege is available only if the Defendant says upon his oath that his answer would criminate himself."

Petitioner's only objection was at the beginning of his examination and was that testifying generally would incriminate him with respect to the instant bastardy proceeding. (R 94-98) **At trial he never claimed that his testimony would incriminate him with respect to some other possible danger or proceeding.** Petitioner proceeded to voluntarily answer each and every question without objection. This is a classic example of waiver. Petitioner's claim at this late date is the kind of "pure afterthought" condemned in *Rogers* v. *U. S.,* 340 US 367.

The privilege "is deemed waived unless invoked" *U. S.* v. *Murdick,* 284 US 141. Petitioner's motion for a new trial and assignments of error (Petitioner's Exhibits G and J) only protested that Respondent was forced to testify as on cross-examination.

Never, at trial nor in briefs and argument to the trial court, Court of Appeals or Supreme Court of Ohio, did petitioner ever object on the ground that his answer might incriminate him with respect to prosecution for fornication. Respondent has no standing to raise this later question for the first time in this Honorable Court after this waiver in the Courts of Ohio.

In any event the protection of the 5th Amendment "must be confined to instances where the witness has reasonable danger from direct answer." *Hoffman* v. *U. S.,* 341 US 479. Disclosure of intimacy with Respondent presented no more than a "mere imaginary possibility" of prosecution under Ohio Revised Code 2905.08 which prohibits adultery and fornication. Respondent and Petitioner were both single at the time of the intercourse, and no charge of adultery was possible. Constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of the law." *Mason* v. *U. S.,* 244 US 362 and does not apply to "dangers of an imaginary and insubstantial

character, having reference to some extraordinary and barely possible contingency so improbable that no reasonable man would suffer it to influence his conduct." *Brown* v. *Walker,* 161 US 591.

No one has been prosecuted for fornication in Hamilton County, Ohio in the past twenty years. Defendant exhibited no fears of prosecution when he answered the same question in deposition taken by agreement of counsel prior to the trial. Defendant had no fears of prosecution at the time of trial, or for that matter until this petition was filed nearly two years later.

All this evidence belies the argument that petitioner ever considered himself in any kind of danger.

III. Petitioner's claim that he was deprived of the right to an impartial jury under the 6th Amendment has no merit.

There is no authority or reason stated why this Honorable Court should accept the affidavits offered by petitioner and reject the affidavits offered by Respondent. As the Court stated in the case of *Whited* v. *State ex rel Fuller,* 21 OLA 469:

> ". . . the defendant produced the affidavits of Mike Basbore and Robert Comer to the effect that about the noon hour on the day of trial, they heard the juror, Frank T. Kohlhorst, discuss the merits of the case and that they heard said juror say that as far as he was concerned the case was decided. As opposed to this claim, the Complainant presented to the Court the affidavits of said Frank T. Kohlhorst and William Gest. These affiants denied a discussion of the merits of the instant case . . . In disposing of this ground of the motion for new trial, the Court had before it these affidavits. When it overruled the motion the trial Court evidently found that there had been no

> misconduct on the part of this juror. From any examination of the record as it appears we cannot say that this was an erroneous finding of the Court."

Even if petitioner's allegations were considered to be true, there is no evidence showing any material prejudice to petitioner or lack of due process. As stated in *Turnpike Commission* v. *Ellis,* 164 OS 377:

> "The refusal of the Trial Court to grant a new trial for claimed misconduct of a juror in making improper and indiscreet remarks during the progress of the trial will not be disturbed where such remarks were not induced by either party or his counsel and where it is not apparent that the juror's indiscretion influenced the unanimous verdict returned."

The record indicates no reason for reversing the Trial Court's determination of fact with respect to the conflicting affidavits.

CONCLUSION

Petitioner has shown no error in the proceedings or reason why this cause should be reviewed by this Court. For all these reasons the petition should be denied.

Respectfully submitted,

DOUGLAS G. COLE
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Respondent

Of Counsel:
PAUL H. TOBIAS
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MAY 28 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1013

LOUIS J. SCHWARTZ,

Petitioner,

v.

RUBENIA TANNER,

Respondent.

REHEARING FOR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RICHARD D. HANEY,
900 Fountain Square Bldg.,
Cincinnati 2, Ohio,
Counsel for Petitioner.

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CINCINNATI, OHIO

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Respondent.

REHEARING FOR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner Louis J. Schwartz files this Petition for Rehearing to apprise this honorable Court of substantial facts and circumstances not heretofore brought to its attention which were not known by Petitioner at the time he filed his original Petition.

REASON FOR GRANTING THE WRIT

The writ in favor of the Petitioner should be granted because the chief testimony of the Respondent was untrue and the supporting testimony of Respondent's sister was also untrue and incompetent.

The Respondent testified at the trial of this cause (R. 16) that she had no dates with any men other than the Peti-

tioner from the time she came to Cincinnati in early July through the middle of October of the year 1960. This is untrue. (See Appendix A.)

The Respondent's sister Mrs. Ruby Dotzawer testified (R. 105) that the Respondent had dates with no other men than the Respondent during the period from July to October of 1960. This was also, obviously untrue and the witness was incompetent as well. (Appendix A.)

It is the position of the Petitioner that the Respondent was pregnant before he ever knew her. (See second paragraph, page 9 Petitioner's original Petition.

The Petitioner was contacted with malice aforethought, namely being accused of being the father of an already conceived child.

Respondent was at least six months pregnant with another illegitimate child when she testified in the original trial of this matter. (See Appendix B.) It is believed that a certain man with whom Respondent admitted being intimate (see page 20 Transcript Preliminary Hearing) is in fact the father of both the Respondent's illegitimate children.

CONCLUSION

Petitioner's career and future life is at stake, he has been adjudicated the father of a child through perjured testimony. The Record is replete with prejudicial error. For all these reasons Petitioner should have his cause reviewed and he should be granted a Writ of Certiorari as prayed for.

Respectfully submitted,

RICHARD D. HANEY,
900 Fountain Square Bldg.,
Cincinnati 2, Ohio,
Attorney for Respondent.

APPENDIX A

STATE OF OHIO }
COUNTY OF HAMILTON } ss.

William F. Scanlon, being first duly sworn, says that he is an Attorney at Law; that as such Attorney he originally represented Rubenia Tanner in her claim against Louis J. Schwartz, L.J.S.; that he withdrew as her attorney because he felt there was no merit to her claim; that he also represented her brother-in-law Orville Dotzawer; that said Rubenia Tanner had social dates with other men during the period of conception including Max David, of Cleveland, Ohio; that her sister Mrs. Dotzawer, a witness in the case, had a history of mental disturbance and was confined to the psychiatric ward of Good Samaritan Hospital in June, 1963.

WILLIAM F. SCANLON

Sworn to before me and subscribed in my presence this 27th day of May 1965.

RICHARD D. HANEY,
Notary Public,
State of Ohio.

APPENDIX B

OHIO DEPARTMENT OF HEALTH

Division of Vital Statistics

CERTIFICATE OF LIVE BIRTH

Registrar's No. 63-12595
Birth No. 134—

Reg. Dist. No. 3101

1. PLACE OF BIRTH
   a. COUNTY
      Hamilton
   b. CITY, VILLAGE, OR LOCATION
      Cincinnati
   c. NAME OF HOSPITAL OR INSTITUTION
      Catherine Booth Hospital
   d. IS PLACE OF BIRTH INSIDE CITY LIMITS?
      Yes X No
2. USUAL RESIDENCE OF MOTHER
   a. STATE Ohio b. COUNTY Hamilton
   c. CITY, VILLAGE, OR LOCATION
      Cincinnati
   d. STREET ADDRESS
      9888 Norcrest Dr.
   e. IS RESIDENCE INSIDE CITY LIMITS?
      Yes X No
   f. IS RESIDENCE ON A FARM?
      Yes No X
3. NAME (TYPE OR PRINT)
   Michael Brian Tanner
4. SEX
   Male

5a. THIS BIRTH
   Single X Twin Triplet

* * * * *

Appendix B

6. DATE OF BIRTH
8/29/63

* * * * *

12. MAIDEN NAME
Rubenia Tanner
13. COLOR OR RACE
White
14. AGE (At time of this birth)
32 years
15. BIRTHPLACE (State or foreign country)
Tennessee
16. PREVIOUS DELIVERIES TO MOTHER (Do NOT include this birth)
    a. How many OTHER children are now living?
    2
    b. How many OTHER children were born alive but are now dead?
    0
    c. How many fetal deaths (fetuses born dead at ANY time after conception?)
    0
17. INFORMANT'S NAME OR SIGNATURE
Rubenia Tanner
18. MOTHER'S MAILING ADDRESS
3595 Washington Ave., Cinti, Ohio
19. DATE SEROLOGIC TEST FOR SYPHILIS
8-29-63

I hereby certify that this child was born alive on the date stated above.

19a. SIGNATURE
/s/ STEPHEN HORNSTEIN
19b. ATTENDANT AT BIRTH
M. D. X D. O. MIDWIFE
19c. ADDRESS
7719 Reading Rd., Cinti, Ohio
19d. DATE SIGNED
8/29/63

20. DATE RECD. BY LOCAL REG.
SEP 5 1963
21. REGISTRAR'S SIGNATURE
/s/ MARY ANN BERENS

* * * * *

Appendix B

I hereby certify that this Petition for Rehearing is filed for the sole purpose of bringing additional facts before the Supreme Court of the United States and is for no purpose of delay.

RICHARD D. HANEY
Attorney for Petitioner